UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JUANITA VILLAFANE,	:	
Petitioner,	:	02 Civ. 8667 (WHP)(HBP)
-against-	:	REPORT AND RECOMMENDATION
SUPERINTENDENT ELAINE LORD,	:	
Respondent.	:	

PITMAN, United States Magistrate Judge:

TO THE HONORABLE WILLIAM H. PAULEY, III, United States District Judge,

I. Introduction

Petitioner Juanita Villafane seeks, by her pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. Section 2254, an Order vacating the sentence imposed on her on March 3, 1999, on her guilty plea, by the Supreme Court of the State of New York, New York County (Scherer, J.), for six counts of robbery in the first degree, two counts of assault in the first degree and one count of attempted assault in the first degree, in violation of New York Penal Law Sections 160.15, 120.10, and 120.10 and 110.00, respectively. On that date, petitioner was sentenced as a predicate felon to seven concurrent determinate terms of imprisonment of twenty-five years on each of

the robbery and assault counts and a concurrent determinate term of imprisonment of fifteen years on the attempted assault count, for an aggregate sentence of twenty-five years. Petitioner is currently incarcerated pursuant to that judgment.

For the reasons set forth below, I respectfully recommend that the petition be denied.

II. Facts

A. Facts Giving Rise to Petitioner's Conviction

Petitioner's conviction arises out of a string of extremely violent robberies and assaults committed in lower Manhattan in late 1997. The evidence offered at trial, as summarized in petitioner's brief on direct appeal, established the following facts.

On December 14, 1997, petitioner and her co-defendant assaulted and robbed Jenny Sheffield, and undergraduate at New York University. While Sheffield was walking to her residence, petitioner ran up to her, cut her face and demanded money. After pulling her hair and kicking her, petitioner and her co-defendant ran off with Sheffield's bag. The wound on Sheffield's face required suturing (Petitioner's Brief to the Appellate Division of the Supreme Court, dated August 2001 ("Pet. Brf."), at 5-6,

annexed as Exhibit B to the Declaration of Assistant Attorney General Darian B. Taylor, dated April 3, 2003 ("Taylor Decl.")).

The following day, December 15, 1997, petitioner and her co-defendant assaulted and robbed Jonathan Kopp as he entered his apartment building. Petitioner's co-defendant held a knife to Kopp's throat, pushed him to his knees and demanded money. Kopp complied and handed his money to petitioner. After saying something to her co-defendant about mace, petitioner instructed Kopp to open his eyes and sprayed each of Kopp's eyes twice with pepper spray, temporarily blinding him and causing him pain for several days (Pet. Brf. at 6).

On December 17, 1997, petitioner and her co-defendant assaulted and robbed Jenny Isaacs as she entered her apartment building. After throwing Isaac's up against a gate and holding a knife in her face, petitioner's co-defendant held a knife to Isaac's side and demanded money. Isaacs gave petitioner's co-defendant her money, and he punched her in the head (Pet. Brf. at 6).

On December 23, 1997, Kiu Xiang Wu was returning to her home on Delancey Street at approximately 6:30 p.m. Petitioner and her co-defendant followed Wu into her apartment building, grabbed her purse and pushed her head down from behind. Petitioner cut Wu's neck twice. Although Wu tried to escape, petitioner chased her with a knife. Petitioner's co-defendant

pulled petitioner away, and the two left Wu's building. Wu was hospitalized for five days as a result of the stabbing. Medical testimony established that Wu's carotid artery had been slashed in the course of the attack (Pet. Brf. at 4-5).

Five days later, on December 28, 1997, petitioner and her co-defendant assaulted and robbed Carlos Rivera as he was walking home from his girlfriend's apartment. Rivera was hit on the head and repeatedly stabbed in the chest. Rivera suffered very serious internal injuries as a result of the attack and was hospitalized until early February (Pet. Brf. at 4).

Petitioner and her co-defendant were arrested on December 30, 1997; initially, they were arrested solely in connection with the Rivera stabbing. After being arrested and advised of her rights, petitioner admitted to having participated in the robberies and assaults described above in addition to the robbery of Laura Gratwick on December 18, 1997 (Taylor Decl. Ex. A at 49-51, 55-56, 60).

After the commencement of petitioner's trial, petitioner decided to plead guilty to the offenses described above and to waive her right to appeal in return for an aggregate determinate sentence of twenty-five years (Transcript of Proceedings, dated February 9, 1999 (Docket Item 12) ("Plea Tr."), at 531).

Prior to accepting petitioner's plea, the Trial Court conducted a searching inquiry to ensure that the plea was knowing and voluntary in all respects; the allocution included the following testimony from petitioner:

THE COURT: Ms. Villafane, do you understand that you're pleading to six counts of robbery in the first degree, two counts of assault in the first degree and one count of attempted assault in the first degree. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And have you had enough time to discuss these pleas with your attorney, Mr. Brackley?

THE DEFENDANT: Yes.

THE COURT: And I assume, Ms. Villafane, that this is not the first time you've had a conversation with Mr. Brackley about the possibility of pleading guilty in this case; is that correct?

THE DEFENDANT: That's correct.

THE COURT: So on this occasion, and on other occasions, you have had an ample opportunity to discuss with Mr. Brackley what your potential exposure might be, what the extent of your case is and what defenses you might have to this action, and any other questions that might cross your mind, in order for you to make an intelligent judgment about this; is that correct?

THE DEFENDANT: Yes.

[THE COURT]: Has Mr. Brackley adequately answered all those questions for you?

THE DEFENDANT: Yes.

THE COURT: And I would note also, for the record, that your father is present in court today; is that correct?

THE DEFENDANT: My husband.

THE COURT: It's your husband?

THE DEFENDANT: Yes.

THE COURT: And is it true that you have on other occasions discussed the possibility of pleading guilty with him?

THE DEFENDANT: Yes.

THE COURT: For the record I gave you the opportunity to have a court visit with him and were you able, and did you discuss with him the advisability of your pleading guilty in this case?

THE DEFENDANT: Yes.

THE COURT: So, I take it from all of this that you have had ample opportunity to think about it; to consider and discuss this with any people that you thought could assist you in making this determination; is that correct?

THE DEFENDANT: Yes.

THE COURT: So, is it true that you are entering this plea voluntarily or have you been coerced in any way? It's one or the other; voluntarily or coerced.

THE DEFENDANT: Voluntarily.

THE COURT: Nobody has pressured you or threatened or forced you in any way to plead guilty; is that correct?

THE DEFENDANT: That's correct.

THE COURT: Okay. And you understand that I have promised you a sentence of twenty-five years determinate; to run concurrent on all these cases. You understand that promise?

THE DEFENDANT: Yes.

THE COURT: And has anyone promised you anything else?

THE DEFENDANT: No.

THE COURT: Okay.

And you understand that a condition of that promise is that you waive your right to appeal in this matter? The only appealable issues really arise out of the hearing and this proceeding, now that we are engaged in the sentencing proceeding.

You understand that by waiving your right to appeal, this case is finally and completely over. That no other judge or judges will review what happened at the suppression hearing or what's happening today in court, in terms of taking this plea.

Nobody will ever look at it again. It will be the final thing. Rather, this plea will be the final proceeding but for the sentence in this case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Have you discussed that with Mr. Brackley the waiver of appeal? And has he explained to you all of the ramifications of exactly what that means?

THE DEFENDANT: Yes.

THE COURT: And answered all your questions about that?

THE DEFENDANT: Yes.

* * *

THE COURT: Ms. Villafane, during the course of this trial, the possibility of a defense has been raised by you, through your attorney, Mr. Brackley.

During the course of this trial, there's also been testimony and evidence with respect to certain confessions that you made to police officers or detectives or sergeant[s], after you were apprehended in this case.

You're familiar with all of this; is that correct?

THE DEFENDANT: Yes.

THE COURT: And those confession[s] that you made to police officers about your reasons or reason, rather, for committing these crimes, was that the truth?

THE DEFENDANT: Yes.

THE COURT: So, is it true that you committed these crimes with Mr. Santiago because of your drug addiction and because of your need for money in order to buy drugs; is that true?

THE DEFENDANT: Yes.

* * *

THE COURT: The possibility of a defense in this case which would explain your conduct in any way other than you have just described it to me, you've discussed the strategy of using another defense in this case with Mr. Brackley?

THE DEFENDANT: Yes.

THE COURT: And he's answered whatever questions you might have about the viability or the believability or the success that you might have at trial by asserting any other defense; is that correct?

THE DEFENDANT: Yes.

THE COURT: And do I understand you completely now, that the reason that you committed these crimes was because of your and Mr. Santiago's drug addiction, and your lack of money to buy drugs? Is that the reason these crimes were committed?

THE DEFENDANT: Yeah.

(Plea Tr. at 533-37, 547-49).

Petitioner was sentenced on March 3, 1999 as indicated above (Taylor Decl. Ex. A at 9, 14-16).

B. Proceedings on Direct Appeal

Notwithstanding her waiver of appellate rights, petitioner appealed her conviction to the Appellate Division of the Supreme Court, First Department, asserting two claims:

> 1. Whether appellant's sentence should be vacated, and her case remanded for re-sentencing, to be preceded by the preparation of a complete and updated pre-sentence report that would include a social history and documentation that the battered women's syndrome lowered appellant's resistance to her co-defendant's demands that she participate in the charged crimes. C.P.L. §§ 390.20; 390.30.
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> 2. Whether a sentence of 25 years for each of the six robberies and two assaults was excessive where appellant committed these crimes while in virtual enslavement to a violent man with whom she had an abusive relationship, and who had recently stabbed her because he was dissatisfied with her cooking, and had threatened to do further harm to her and to her children if she did not assist him in the robberies; and whether the sentence of 15 years for attempted assault was excessive where the court imposed the maximum sentence even though this was the first time that appellant had committed a violent crime. C.P.L. §§ 470.15(2)(c) and (3).

(Taylor Decl. Ex. B at 2).

The Appellate Division affirmed petitioner's conviction and sentence, stating:

> Judgments, Supreme Court, New York County (Micki Scherer, J.), rendered March 3, 1999, convicting defendant, upon her pleas of guilty, of robbery in the first degree (six counts), assault in the first degree (two counts) and attempted assault in the first degree, and sentencing her, as a second felony offender, to eight terms of 25 years and a term of 15 years, all to run concurrently, unanimously affirmed.

> By failing to request any remedy, defendant did not preserve her current claim that the pre-sentence report was not adequate to inform the court fully regarding defendant's personal background, including her claim that she was a victim of battered women's syndrome, and we decline to review it in the interest of justice (People v Scott, 251 AD2d 248; People v Smallwood, 212 AD2d 449, lv denied 86 NY2d 741). Defendant's assertion that the report was the functional equivalent of no report at all is unfounded. Were we to review defendant's claim, we would find no basis for a remand for resentencing. Any deficiencies in the personal history section of the report were the result of defendant's refusal to be interviewed (see, People v Greene, 209 AD2d 541, lv denied 85 NY2d 909). In any event, prior to imposing the negotiated sentence, the court was in possession of, inter alia, an evaluation of defendant by a defense psychologist and was fully apprised of all the information defendant now claims should have been included in the pre-sentence report (see, People v Scott, supra).
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> Defendant's valid waiver of her right to appeal forecloses review of her excessive sentence claim (People v Seaberg, 74 NY2d 1, 9-10). In any event, we perceive no basis for a reduction of sentence.

People v. Villafane, 294 A.D.2d 117, 117-18, 740 N.Y.S.2d 872, 872-73 (1st Dep't 2002).

Petitioner subsequently sought leave to appeal to the New York Court of Appeals asserting the same claims that she raised before the Appellate Division. The New York Court of Appeals denied petitioner leave to appeal on June 24, 2002. People v. Villafane, 98 N.Y.2d 682, 774 N.E.2d 237, 746 N.Y.S.2d 472 (2002).

Petitioner asserts here the same two claims she raised on her direct appeal. Respondent opposes the petition on the grounds of procedural bar and on the merits.

III. Analysis

A. Petitioner's Claim Concerning the Adequacy of the Presentence Report

Assuming that the petitioner's claim concerning the adequacy of the presentence report states a federal claim that is cognizable in a habeas corpus proceeding, the claim should be dismissed because it is a procedurally barred.

A habeas petitioner's constitutional claim can be procedurally barred where it is not asserted in state court proceedings in accordance with state procedural requirements and the state courts rely on that violation of state procedural requirements to reject the claim. As the Court of Appeals for the Second Circuit has explained:

> The independent and adequate state ground doctrine first arose in the context of direct appeals to the Supreme Court from final judgments of the state courts. Under that doctrine the Supreme Court "will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." Coleman v. Thompson, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Moreover, "[t]his rule applies whether the state law ground is substantive or procedural." Id.
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> The doctrine also applies in the context of federal courts reviewing applications for a writ of habeas corpus . . . . [I]nvoking principles of comity and federalism . . . federal habeas courts faced with an independent and adequate state ground of decision defer

> in the same manner as does the Supreme Court on direct review.
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> An exception obtains only if the petitioner demonstrates both good cause for and actual prejudice resulting from his noncompliance with the state's procedural rule. See Engle v. Isaac, 456 U.S. 107, 129, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

Garcia v. Lewis, 188 F.3d 71, 76-77 (2d Cir. 1999). See also Cotto v. Herbert, 331 F.3d 217, 239-41 (2d Cir. 2003); Rhagi v. Artuz, 309 F.3d 103, 106 (2d Cir. 2002) ("Absent a showing of cause and prejudice, it is settled law that an independent and adequate state law ground for a state court conviction cannot be disturbed on habeas."), citing Coleman v. Thompson, 501 U.S. 722, 729-31 (1991); Morales v. Artuz, 98 Civ. 6558 (JGK), 2000 WL 1693563 at *5-*6 (S.D.N.Y. Nov. 13, 2000), aff'd, 281 F.3d 55 (2d Cir. 2002); Norwood v. Hanslmaier, 93 CV 3748, 1997 WL 67669 at *2 (E.D.N.Y. Feb. 11, 1997).

Dismissal of a claim on the ground that consideration of the merits is precluded by an adequate and independent state procedural ground is appropriate where the last reasoned state court decision expressly relies on a state procedural bar:

> In Harris [v. Reed], 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)], the Court held that "a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar." Harris, 489 U.S. at 263, 109 S.Ct. 1038 (internal quotation marks omitted). We apply the

> Long/Harris presumption to the last "reasoned state judgment" . . . . See Ylst v. Nunnemaker, 501 U.S. 797, 803, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

Jones v. Stinson, 229 F.3d 112, 118 (2d Cir. 2000). See also Galarza v. Keane, 252 F.3d 630, 637 (2d Cir. 2001) ("We have repeatedly stated that in order for federal habeas review to be procedurally barred, a state court must actually have relied on a procedural bar as an independent basis for its disposition of the case, and the state court's reliance on state law must be unambiguous and clear from the face of the opinion.").

As long as the state court relies on a procedural bar as an independent basis for its decision, a claim will be procedurally barred on federal habeas review even where a state court addresses the merits of the claim in the alternative. As the Court of Appeals has noted:

> This court has held that "federal habeas review is foreclosed when a state court has expressly relied on a procedural default as an independent and adequate state ground, even where the state court has also ruled in the alternative on the merits of the federal claim." Velasquez v. Leonardo, 898 F.2d 7, 9 (2d Cir. 1990); Harris, 489 U.S. at 264 n. 10, 109 S.Ct. at 1044 n. 10 ("[A] state court need not fear reaching the merits of a federal claim in an alternative holding."); Wedra v. Lefevre, 988 F.2d 334, 338-39 (2d Cir. 1993).

Glenn v. Bartlett, 98 F.3d 721, 724 (2d Cir. 1996). See also Fama v. Comm'r of Corr. Servs., 235 F.3d 804, 810 (2d Cir. 2000); Johnson v. Dufrain, 99 Civ. 12019 (DC), 2001 WL 406261 at *5 (S.D.N.Y. Apr. 20, 2001); Torres v. Irvin, 33 F. Supp.2d 257, 264 (S.D.N.Y. 1998).

In this case the Appellate Division expressly found that petitioner's claim concerning the presentence report was unpreserved:

> By failing to request any remedy, defendant did not preserve her current claim that the presentence report was not adequate to inform the court fully regarding defendant's personal background to inform the court fully regarding defendant's personal background, including her claim that she was a victim of battered women's syndrome, and we decline to review it in the interest of justice (People v. Scott, 251 AD2d 248; People v Smallwood, 212 AD2d 449, lv denied 86 NY2d 741).

People v. Villafane, supra, 294 A.D.2d at 117, 740 N.Y.S.2d at 872.

Petitioner might be able to overcome this procedural bar by showing cause for and prejudice from her procedural default or by showing that a failure to consider her claim would result in a fundamental miscarriage of justice. See Coleman v. Thompson, supra, 501 U.S. at 750 ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."); Engle v. Isaac, 456 U.S. 107, 129 (1982) ("[W]hen a procedural default bars state litigation of a constitutional claim, a state prisoner may not obtain federal

habeas relief absent a showing of cause and actual prejudice."). Petitioner has not, however, even attempted to make either showing.

Accordingly, petitioner's claim concerning the presentence report should be dismissed on the ground of procedural bar.

B. Petitioner's Claim Concerning the Duration of Her Sentence

Respondent contends that petitioner's claim concerning the duration of her sentence is unexhausted, procedurally barred and fails on the merits. Assuming without deciding that petitioner's claim concerning the duration of her sentence also states a cognizable federal claim, I conclude that it is unexhausted, it is not procedurally barred, but that it fails on the merits.

It is fundamental that a state prisoner seeking to vacate her conviction on the ground that her federal constitutional rights were violated must first exhaust all available state remedies. 28 U.S.C. § 2254(b); Baldwin v. Reese, 541 U.S. 27, 29 (2004); Picard v. Connor, 404 U.S. 270, 275 (1971); Fama v. Comm'r of Corr. Servs., supra, 235 F.3d at 808. As the Court of Appeals has noted:

> If anything is settled in habeas corpus jurisprudence, it is that a federal court may not grant the habeas petition of a state prisoner "unless it appears that

> the applicant has exhausted the remedies available in the courts of the State; or that there is either an absence of available State corrective process; or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." 28 U.S.C. § 2254(b)(1).

Aparicio v. Artuz, 269 F.3d 78, 89 (2d Cir. 2001).

A two-step analysis is used to determine whether a claim has been exhausted:

> First, the petitioner must have fairly presented to an appropriate state court the same federal constitutional claim that he now urges upon the federal courts. . . .
>
> Second, having presented his federal constitutional claim to an appropriate state court, and having been denied relief, the petitioner must have utilized all available mechanisms to secure [state] appellate review of the denial of that claim.

Klein v. Harris, 667 F.2d 274, 282 (2d Cir. 1981) (citations omitted), overruled on other grounds, Daye v. Attorney Gen., 696 F.2d 186, 191 (2d Cir. 1982) (en banc); see also Baldwin v. Reese, supra, 541 U.S. at 28; McKethan v. Mantello, 292 F.3d 119, 122 (2d Cir. 2002), quoting Ramirez v. Attorney Gen., 280 F.3d 87, 94 (2d Cir. 2001); accord Powell v. Greiner, 02 Civ. 7352 (LBS), 2003 WL 359466 at *1 (S.D.N.Y. Feb. 18, 2003); Alston v. Senkowski, 210 F. Supp.2d 413, 417 (S.D.N.Y. 2002); Boyd v. Hawk, 94 Civ. 7121 (DAB), 1996 WL 406680 at *3 (S.D.N.Y. May 31, 1996).

To satisfy the first element of the exhaustion test, a habeas petitioner must fairly present his federal claim to the state courts. Anderson v. Harless, 459 U.S. 4, 6 (1982); Cox v.

Miller, 296 F.3d 89, 99 (2d Cir. 2002); Galarza v. Keane, 252 F.3d 630, 638 (2d Cir. 2001); Daye v. Attorney Gen., supra, 696 F.2d at 191. In Daye v. Attorney Gen., supra, 696 F.2d at 194, the Court of Appeals set forth the methods by which a federal claim can be fairly presented to a state court:

> [T]he ways in which a state defendant may fairly present to the state courts the constitutional nature of his claim, even without citing chapter and verse of the Constitution, include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claims in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation.

See also Strogov v. Attorney Gen., 191 F.3d 188, 191 (2d Cir. 1999) (A claim is considered fairly presented when it has "informed [the State] courts of 'all the essential factual allegations' and 'essentially the same legal doctrine [asserted] in [the] federal petition.'"), quoting Daye v. Attorney Gen., supra, 696 F.2d at 191-92. An argument to a state appellate court that a conviction or sentence is in derogation of state law does not fairly present a federal claim. Gray v. Netherland, 518 U.S. 152, 162-63 (1996); Duncan v. Henry, 513 U.S. 364, 365-66 (1995); Picard v. Connor, supra, 404 U.S. at 277-78.

To satisfy the second step of the analysis, "[a] petitioner must present his federal constitutional claims to the highest court of the state before a federal court may consider

the merits of the petition." Grey v. Hoke, 933 F.2d 117, 119 (2d Cir. 1991); see also O'Sullivan v. Boerckel, 526 U.S. 838, 847-48 (1999). Exhaustion requires that a prisoner must even pursue discretionary state appellate remedies before he can raise a claim in a habeas corpus proceeding. O'Sullivan v. Boerckel, supra, 526 U.S. at 846-48.

Unexhausted claims are deemed exhausted if the petitioner no longer has any remedy available in the state courts. Gray v. Netherland, supra, 518 U.S. at 161; Engle v. Isaac, supra, 456 U.S. at 124 n.28; Nevarez v. Artuz, 99 Civ. 2401 (LBS), 2000 WL 718450 at *3 (S.D.N.Y. June 5, 2000); Hurd v. Stinson, 99 Civ. 2426 (LBS), 2000 WL 567014 at *7 (S.D.N.Y. May 10, 2000).

> This apparent salve, however, proves to be cold comfort to most petitioners because it has been held that when "the petitioner failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred," federal habeas courts also must deem the claims procedurally defaulted. Coleman v. Thompson, 501 U.S. 722, 735 n.1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Aparicio v. Artuz, supra, 269 F.3d at 90.

In the absence of a showing of cause for and prejudice from the failure to raise the claim in conformity with state procedural requirements or a fundamental miscarriage of justice, such a claim, although deemed exhausted, will be forfeited and barred from serving as the basis for habeas relief.

> Where a petitioner has failed to present his or her federal claims to the state courts in accordance with state procedural requirements, and no longer has recourse to state review, he or she will be found to have met the exhaustion requirement of 28 U.S.C. §2254(b); however, the claims will be subject to procedural bar in this court. See Coleman v. Thompson, 501 U.S. 722 (1991); Castille v. Peoples, 489 U.S. 346, 350 (1989); Teague v. Lane, 489 U.S. 288, 297-98 (1989). If there is such a procedural bar, the claim cannot be heard absent a showing of cause for the procedural default and prejudice. Wainwright v. Sykes, 433 U.S. 72 (1977).

Norwood v. Hanslmaier, supra, 1997 WL 67669 at *2; see also Coleman v. Thompson, supra, 501 U.S. at 750; Engle v. Isaac, supra, 456 U.S. at 129.

Petitioner's brief on direct appeal raised no federal issue whatsoever concerning her sentencing. Petitioner used none of the four alternative methods outlined in Daye v. Attorney General, supra, 696 F.2d at 194, to assert the violation of any federally protected right. Although petitioner did argue that her sentence was too long, she argued that it was too long in light of her allegedly impaired mental state and that her sentence should be reduced "in the interest of justice" (Taylor Decl. Ex. B at 26). She made no argument that even remotely suggested that the sentence gave rise to a constitutional issue. The weight of authority holds that an excessive-sentence argument based on the alleged abuse of the sentencing court's discretion, such as that made here, does not exhaust an Eighth Amendment claim. Anderson v. Phillips, 03 CV 5192 NGG, 2005 WL 1711157 at

*4-*5 (E.D.N.Y. July 20, 2005); Acosta v. Giambruno, 326 F. Supp.2d 513, 521-22 (S.D.N.Y. 2004); Reyes v. Phillips, 02 Civ. 7319 (LBS), 2003 WL 42009 at *3 (S.D.N.Y. Jan. 6, 2003); Santana v. Artuz, 97 Civ. 3387 (RCC)(RLE), 2001 WL 474207 at *3 (S.D.N.Y. May 1, 2001); Bordas v. Walker, 97 Civ. 2982 (MGC), 2000 WL 1867915 at *2, (S.D.N.Y. Dec. 21, 2000); Cuadrado v. Stinson, 992 F. Supp. 685, 687 (S.D.N.Y. 1998).

Respondent, however, is incorrect in asserting that the claim is now procedurally barred because petitioner is no longer able to raise this claim in state court. New York Criminal Procedure Law Section 440.20 permits prisoner to assert collateral attacks on allegedly illegal sentences, and, unlike motions under Criminal Procedure Law Section 440.10 attacking a judgment of conviction, an attack on a sentence pursuant to Section 440.20 is not barred by the prisoner's unjustified failure to assert the claim on direct appeal. Santana v. Artuz, supra, 2001 WL 474207 at *3; Bordas v. Walker, supra, 2000 WL 1867915 at *2.[1] Since petitioner remains able to assert an Eighth Amendment claim in state court, I conclude that it is unexhausted but not procedurally barred.

[1]In the absence of an intervening change in the law, a collateral attack on a sentence is barred, however, where the claim sought to asserted in a 440.20 motion was actually made and rejected on direct appeal. N.Y. Crim. Proc. L. § 440.20(2).

Although it is unexhausted, this court may still consider the claim on the merits to reject the claim. 28 U.S.C. § 2254(b)(2); Rhines v. Weber, 544 U.S. 269, ___, 125 S.Ct. 1528, 1535 (2005). Given the claim's patent lack of merit, I conclude that the most efficient course is to interpret petitioner's claim as asserting that her sentence violates the Eighth Amendment because it is excessive and to reject the claim on the merits.[2]

A sentence may violate the Eighth Amendment when the sentence is "grossly disproportionate" to the crime committed or when the sentence imposed "shocks the collective conscience of society." United States v. Gonzalez, 922 F.2d 1044, 1053 (2d Cir. 1991); see also Lockyer v. Andrade, 538 U.S. 63, 73 (2003); Harmelin v. Michigan, 501 U.S. 957, 1001 (1991); United States v. Romano, 825 F.2d 725, 731 (2d Cir. 1987); Pressley v. Bennett, 235 F. Supp.2d 349, 368-69 (S.D.N.Y. 2003); Calderon v. Keane, 97 Civ. 2116 (RCC)(JCF), 2002 WL 1205745 at *14 (S.D.N.Y. Feb. 21, 2002) (Report & Recommendation), adopted, 2003 WL 22097504 (S.D.N.Y. Sept. 9, 2003), aff'd without published opinion, 115 Fed. Appx. 455 (2d Cir. 2004); Sutton v. Herbert, 39 F. Supp.2d 335, 337 (S.D.N.Y. 1999); see generally Ewing v. California, 538 U.S. 11 (2003).

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[2]Because petitioner's Eighth Amendment claim is unexhausted, the state courts could not have addressed it on the merits and, therefore, this court cannot apply the deferential standard of review set forth in 28 U.S.C. § 2254(d). Nevertheless, the claim fails even under a de novo standard of review.

If petitioner is challenging the sentence imposed as an abuse of the Trial Court's discretion, she has failed to state a cognizable constitutional claim. A sentence within the range established by state law, as the sentence here clearly was,[3] is ordinarily not subject to an Eighth Amendment challenge. See White v. Keane, 969 F.2d 1381, 1383 (2d Cir. 1992) (per curiam); Diaz v. Herbert, 317 F. Supp.2d 462, 479-80 (S.D.N.Y. 2004); Brown v. Goord, 02 Civ. 2122 (NRB), 2002 WL 31093611 at *5 (S.D.N.Y. Sept. 13, 2002); Espinal v. Barkely, 95 Civ. 1214 (HB), 1996 WL 673833 at *1 (S.D.N.Y. Nov. 20, 1996); Rodriguez v. O'Keefe, 96 Civ. 2094 (LLS), 1996 WL 428164 at *7 (S.D.N.Y. July 31, 1996), aff'd, 122 F.3d 1057 (2d Cir. 1997).

If petitioner is claiming that her sentence is so disproportionately long that it constitutes an Eighth Amendment violation, her claim also fails. As stated by the Supreme Court, a habeas court will find that a state-law sentence is "grossly disproportionate" and violates the Eighth Amendment only "in the 'exceedingly rare' and 'extreme' case." Lockyer v. Andrade, supra, 538 U.S. at 73, quoting Harmelin v. Michigan, supra, 501 U.S. at 1001; accord Ewing v. California, supra, 538 U.S. at 21;

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[3]New York classifies robbery in the first degree as a Class B felony. N.Y. Penal L. § 160.15. At the time of petitioner's sentencing, and individual who was guilty of robbery in the first degree and had a prior felony conviction, as petitioner had (see Plea Tr. 550-52), was subject to a determinate sentence of 8 to 25 years. N.Y. Penal L. § 70.06(6)(a).

Whitlatch v. Senkowski, 344 F. Supp.2d 898, 905-07 (W.D.N.Y. 2004); Vasquez v. Walker, 01 Civ. 8032 (AKH), 2004 WL 594646 at *5 (S.D.N.Y. Mar. 25, 2004); Ayala v. People, 03 Civ. 2762 (AKH), 2004 WL 527035 at *5 (S.D.N.Y. Mar. 16, 2004); Williams v. Philips, 02 Civ. 5811 (DC), 2003 WL 21961127 at *8 (S.D.N.Y. Aug. 18, 2003).

Petitioner here engaged in a particularly shocking series of robberies. Two of the victims -- Kiu Xiang Wu and Carlos Rivera -- suffered nearly fatal stab wounds, and another victim -- Jonathan Kopp -- was viciously and sadistically sprayed in the eyes with pepper spray after he had surrendered his property. Finally, petitioner brutally slashed Jenny Sheffield's face in the course of robbing her.

Given the aggravated nature of petitioner's crimes, petitioner's sentence here does not shock the conscience and is entirely ordinary. Other courts have reviewed sentences similar to that imposed upon petitioner for comparable offenses and have uniformly upheld such sentences as not violating the Eighth Amendment. See Brown v. Goord, supra, 2002 WL 31093611 at *5-*6 (upholding sentence, as persistent violent felony offender, of consecutive indeterminate prison terms of twenty-five years to life on two first degree robbery counts); Bryant v. Bennett, 00 Civ. 5692 (AGS)(AJP), 2001 WL 286776 at *7 (S.D.N.Y. Mar. 2, 2001) (upholding sentence, as persistent violent felony offender,

of consecutive prison terms of fifteen years to life on two first degree robbery counts and noting that petitioner's sentence was below the minimum sentence authorized); see also Douglas v. Fisher, 04 Civ. 3494 (NRB), 2004 WL 2914083 at *1, *6 (S.D.N.Y. Dec. 16, 2004) (upholding sentence of indeterminate consecutive terms of imprisonment of eight to sixteen years on two counts of first degree robbery); William v. Greiner, 02-CV-1116 (JBW), 2003 WL 23198759 at *1, *14 (E.D.N.Y. Nov. 26, 2003) (upholding sentence of consecutive terms of imprisonment totaling eighteen to thirty-six years on four counts of first degree robbery and one count of criminal possession of a weapon in the second degree); Naranjo v. Filion, 02 Civ. 5449 (WHP)(AJP), 2003 WL 1900867 at *13 (S.D.N.Y. Apr. 16, 2003) (upholding sentence of two consecutive terms of twelve and one-half to twenty-five years imprisonment on two first degree robbery counts).

IV. Conclusion

Accordingly, for all the foregoing reasons, I respectfully recommend that the petition be dismissed.

In addition, since petitioner has not made a substantial showing of the denial of a constitutional right, I also recommend that a certificate of appealability not be issued. 28 U.S.C. § 2253. To warrant the issuance of certificate of appealability, "petitioner must show that reasonable jurists could

debate whether . . . the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Middleton v. Attorneys General of States of N.Y. & Pennsylvania, 396 F.3d 207, 209 (2d Cir. 2005) (per curiam)(quotation marks omitted); see also Love v. McCray, 413 F.3d 192, 195 (2d Cir. 2005) (per curiam). For the reasons set forth above, I conclude that there would be no difference of opinion among reasonable jurists that petitioner's claim concerning the presentence report is procedurally barred and that her claim concerning the duration of her sentence fails on the merits.

I further recommend that certification pursuant to 28 U.S.C. § 1915(a)(3) not be issued because any appeal from this Report and Recommendation, or any Order entered thereon, would not be taken in good faith. See Coppedge v. United States, 369 U.S. 438 (1962).

V. Objections

Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule 72(b) of the Federal Rules of Civil Procedure, the parties shall have ten (10) days from the date of this Report and Recommendation to file written objections. See also Fed.R.Civ.P. 6(a) and 6(e). Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the chambers of

the Honorable William H. Pauley, III, United States District Judge, 500 Pearl Street, Room 2210, New York, New York 10007, and to the chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any requests for an extension of time for filing objections must be directed to Judge Pauley. FAILURE TO OBJECT WITHIN TEN (10) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND WILL PRECLUDE APPELLATE REVIEW. Thomas v. Arn, 474 U.S. 140, 155 (1985); IUE AFL-CIO Pension Fund v. Herrmann, 9 F.3d 1049, 1054 (2d Cir. 1993); Frank v. Johnson, 968 F.2d 298, 300 (2d Cir. 1992); Wesolek v. Canadair Ltd., 838 F.2d 55, 57-59 (2d Cir. 1988); McCarthy v. Manson, 714 F.2d 234, 237-38 (2d Cir. 1983).

Dated: New York, New York
April 7, 2006

Respectfully submitted,

HENRY PITMAN
United States Magistrate Judge

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